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SUPREME COURT

# Supreme Court of Kentucky

2015-SC-000572-DG

CHARLES HARDIN, M.D.

APPELLANT

ON REVIEW FROM COURT OF APPEALS

V. 2015-CA-000305-MR, 2015-CA-000328-MR AND 2015-CA-000332-MR  
MAGOFFIN CIRCUIT COURT NO. 14-CI-00371

JOHN MONTGOMERY, ET AL.

APPELLEES

AND

2015-SC-00575-DG

MAGOFFIN COUNTY BOARD OF ELECTIONS, ET AL

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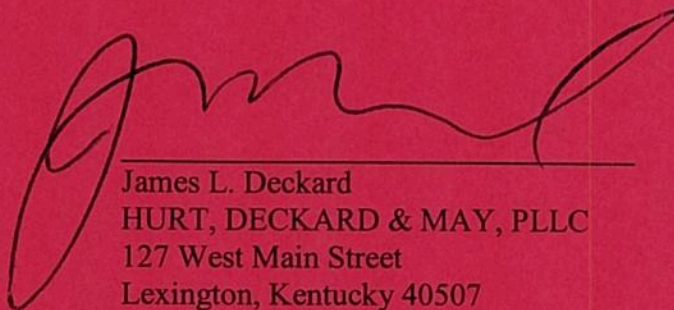
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## BRIEF FOR APPELLANT CHARLES HARDIN, M.D.

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**Respectfully submitted:**

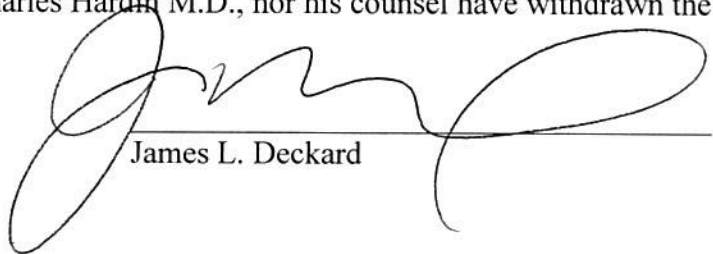
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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that copies of this brief were served upon the following named individuals, via first-class U.S. Mail, postage prepaid, on this the 7<sup>th</sup> day of March, 2016: Hon. Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. John David Preston, Judge, Johnson County Judicial Center, 908 Third Street, Suite 217, Paintsville, Kentucky 41240; Hon. Gordon Long, 100 E. Maple St., Salyersville, Kentucky 41465; Jason Nemes, Fultz, Maddox & Dickens PLC, 101 South Fifth St., 27<sup>th</sup> Floor, Louisville, Kentucky 40202. It is further certified that neither Appellant, Charles Hardin M.D., nor his counsel have withdrawn the record on appeal.



James L. Deckard



## **INTRODUCTION**

This appeal arises out of an election contest. Appellant Charles Hardin, M.D., the incumbent, Democratic Party nominee and winning candidate in the November 2014 General Election for the office of Magoffin County Judge/Executive, appeals the decision of the Kentucky Court of Appeals affirming the Magoffin Circuit Court's judgment that nullified the results of that election. Appellee John Montgomery was then the Republican Party nominee and candidate in that same election. Appellee filed a Notice of Appeal from the trial court's judgment to the Court of Appeals but has not filed a cross-appeal from the Court of Appeals decision to this Court. The Appellant Magoffin County Board of Elections filed a Notice of Appeal from the trial court's judgment and also appeals from the Court of Appeals decision.

### **STATEMENT CONCERNING ORAL ARGUMENT**

By Order entered February 24, 2016, the Court set oral argument in this matter for Wednesday, April 27, 2016, at 11:00 a.m. prevailing Frankfort time in the Supreme Court courtroom. Appellant Charles Hardin, M.D., believes that oral argument will be of assistance to the Court.

## **STATEMENT OF POINTS AND AUTHORITIES**

<b><u>INTRODUCTION</u></b>	i
<b><u>STATEMENT CONCERNING ORAL ARGUMENT</u></b>	ii
<b><u>STATEMENT OF POINTS AND AUTHORITIES</u></b>	iii
<b><u>STATEMENT OF THE CASE</u></b>	1
<b><u>INTRODUCTION</u></b>	1
KRS 120.065	2
KRS 120.165	2, 3
<b><u>BACKGROUND</u></b>	4
KRS 117.085	4
KRS 117.045(11)	4
KRS 117.187(4)	5
KRS 120.015	5
<b><u>ALLEGATIONS OF VOTE BUYING</u></b>	5
<b><u>CLAIMS OF GRAVEL BEING EXCHANGED FOR VOTES</u></b>	9
<b><u>CLAIMS OF DISCREPENCY IN SIGNATURES</u></b>	14
<b><u>ABSENTEE BALLOTS</u></b>	15
The Number of Absentee Ballots	15
Absentee Ballot Applications	16
KRS 117.085(2)	16
The Counting of the Absentee Ballots	18
<b><u>TECHNICAL AND CLERICAL QUESTIONS</u></b>	19
<b><u>ARGUMENT</u></b>	20
<i>Stewart v. Wurts</i> , 143 Ky. 39 (1911)	20, 21
<i>Skain v. Milward</i> , 138 Ky. 200 (1910)	20, 21

<b>I.</b>	<b><u>COUNTS XIII AND XV OF THE PETITION WERE FACIALLY AND FATALLY DEFECTIVE</u></b>	21
	<i>Gross v. West</i> , 283 S.W.2d 358 (1955)	22
	<i>Widick v. Ralston</i> , 303 Ky. 373 (1946)	22
	<i>Johnson v. May</i> , 305 Ky. 292 (1947)	22
	<i>Combs v. Brewer</i> , 169 Ky. 571 (1916)	22
<b>II.</b>	<b><u>THERE IS NO EVIDENCE THAT VOTES WERE BOUGHT BY OR AT THE DIRECTION OF DR. HARDIN</u></b>	22
	<i>Dyche v. Scoville</i> , 270 Ky. 196 (1937)	23, 24
	<i>Wheeler v. Marshall</i> , 132 S.W.2d 519 (1939)	24
	<i>Howard vs. Parsons</i> , 47 S.W.2d 545 (1932)	24
<b>III.</b>	<b><u>THERE IS NO EVIDENCE THAT GRAVEL WAS EITHER UNLAWFULLY PLACED, OR UNLAWFULLY PLACED BY OR AT THE DIRECTION OF DR. HARDIN</u></b>	24
	OAG 82-101	25
<b>IV.</b>	<b><u>THE MAGOFFIN COUNTY BOARD OF ELECTIONS EITHER FULLY COMPLIED OR SUBSTANTIALLY COMPLIED WITH THE PROVISIONS OF KRS CHAPTER 117</u></b>	26
	KRS 120.155	26
	KRS 117.085(2)	26
	<i>Upton v. Knuckles</i> , 420 S.W.2d 822 (Ky. Ct. App. 1971)	26
	<i>Hale v. Goble</i> , 356 S.W.2d 33 (Ky. 1961)	26
	<i>Stable v. Osborne</i> , 217 S.W.2d 980 (Ky. 1949)	27
	<i>Jarboe v. Smith</i> , 250 S.W.2d 490 (Ky. 1961)	27
	<i>Sims v. Atwell</i> , 556 S.W.2d 929 (Ky. App. 1977)	27
	<i>Steel v. Meek</i> , 226 S.W.2d 542 (Ky. 1950)	27
	<i>Ward v. Salyer</i> , 140 S.W.2d 1016 (Ky. 1940)	27
	<i>Ferguson v. Gregory</i> , 216 Ky. 382 (Ky. 1926)	27, 28
	<i>Anderson v. Winfree</i> , 85 Ky. 597 (Ky. 1887)	28
	<i>Watts v. Fugate</i> , 442 S.W.2d 569 (Ky. 1969)	28
<b>A.</b>	<b><u>THE BOARD OF ELECTIONS COMPLIED WITH THE APPLICATION REQUIREMENTS OF KRS 117.085(2)</u></b>	28
	KRS 117.085(2)	28
	<i>Ferguson v. Gregory</i> , 216 Ky. 382 (1926)	29
	<i>Watts v. Fugate</i> , 442 S.W.2d 569 (1969)	29

<b>B.</b>	<b><u>THE MAGOFFIN COUNTY BOARD OF ELECTIONS COMPLIED WITH KRS 117.085(1)(h)</u></b>	30
	KRS 117.085(1)(h)	30
	KRS 117.315	30
	KRS 117.316	30
<b>C.</b>	<b><u>THE MAGOFFIN COUNTY BOARD OF ELECTIONS SUBSTANTIALLY COMPLIED WITH KRS 118.0873(3)</u></b>	31
	KRS 118.0873(3)	31
<b>D.</b>	<b><u>FAILURE TO COMPLY WITH KRS 117.227</u></b>	31
	KRS 117.227	31
	<i>Ferguson v. Gregory</i> , 216 Ky. 382 (1926)	31
<b>E.</b>	<b><u>CLAIMED VIOLATIONS OF KRS 117.255(3)</u></b>	32
	KRS 117.255(3)	32
	<i>Watts vs. Fugate</i> , 442 S.W.2d 569 (1969)	32
	<b><u>CONCLUSION</u></b>	32
	<b><u>APPENDIX</u></b>	A-1



## STATEMENT OF THE CASE

### INTRODUCTION

In the last general election for the office of Magoffin County Judge/Executive, incumbent Dr. Charles Hardin, M.D. (hereinafter “Appellant” or “Dr. Hardin”), was re-elected with a vote total of 3,281, while challenger John Montgomery (hereinafter “Appellee” or “Mr. Montgomery”) fell short with 3,253 votes. On December 4, 2014, the last day an election contest could have been initiated under Kentucky law, Appellee Montgomery filed a petition in the Magoffin Circuit Court naming Dr. Hardin and the Magoffin County Board of Elections (hereinafter “Election Board”) as Respondents.

Kentucky’s election contest statute requires that “[t]he petition shall be filed and process issued within thirty (30) days after the day of election; it shall state the grounds of the contest relied on, and no other grounds shall afterwards be relied on.” KRS 120.155. Despite these clear statutory requirements, and every Kentucky case interpreting the same, the underlying Petition herein made no specific allegations of wrongdoing by or on behalf of Dr. Hardin. On December 23, 2014, Dr. Hardin filed a motion to dismiss the Petition in its entirety, or in the alternative to dismiss those counts that made only broadside “vote buying” allegations since no voter who allegedly either bought or sold a vote was identified *by name or otherwise*. The trial court denied that motion by Order of January 9, 2015.

What followed was a voyage unprecedented in Kentucky law and what no winning candidate for any state office should be subjected to. Through weeks of nearly unfettered discovery for an election contest, and even at trial, not one single voter was ever identified that sold their vote to either candidate – and certainly no evidence that Dr. Hardin committed wrongdoing or that anyone did any questionable act on his behalf. To



be clear, no evidence was elicited or presented, whatsoever, relating to either Dr. Hardin's direct involvement or knowledge of any alleged wrongdoing of any sort.

Despite the tireless efforts of Dr. Hardin to obtain any specific allegation of wrongdoing that might otherwise satisfy the strict requirements of the statutes, none was ever revealed. Even during the course of a fifteen (15) hour multi-day deposition of Appellee John Montgomery, the Appellee was unable to provide *any* details of any irregularities. On January 22, 2015, less than ten (10) days before the trial was scheduled to begin on February 2, 2015,<sup>1</sup> Mr. Montgomery filed a motion for summary judgment setting forth ***for the first time*** claims of irregularities in the *absentee* voter applications. Though the trial court denied the motion, it nevertheless considered the claim on the merits in the trial of this action.<sup>2</sup>

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<sup>1</sup> Over the objections of both Appellant Hardin and the Election Board, the delineated time constraints of KRS 120.065, as applicable to general election contests by KRS 120.165, were tossed aside. "The court may require the contestant, or the person who has the burden of proof under the issue joined, to complete his proof in not less than fifteen (15) days after service of summons, and the contestee, or the person not having the burden, to complete his proof in not less than ten (10) days after filing an answer. Each party may be given one (1) day additional for producing evidence in rebuttal and no greater time shall be extended, unless the court is satisfied that the ends of justice demand it." KRS 120.065.

<sup>2</sup> It appears that the question of the Board of Elections "substantial compliance", well outside of Appellant Dr. Hardin's control, ultimately became the sole support for the Court of Appeals 2-1 affirmance of the trial court's decision to void the election. *See Hardin v. Montgomery, et al.*, 2015-CA-000305-MR (Ky. Ct. App. 2015):

"We conclude that the violations of the Corrupt Practices Act, standing alone, were not sufficient to set aside the election." *Id.* at 8.

"While the accusations of irregularities at the Flat Fork precinct are serious, there was insufficient proof to establish that they caused a significant effect on the outcome of the voting at the precinct." *Id.* at 9.

A bench trial was conducted over the course of four days in February 2015, and on February 20, 2015 (now well over three months since the election), the trial court entered Findings of Fact, Conclusions of Law, and Judgment. (Hereinafter the “Judgment”; Appendix B). Citing KRS 120.165(4), the court held the results of the November 2015 General Election for Magoffin County Judge/Executive to be void and ordered that a new election be held. That result was affirmed in a 2-1 “to be published” Opinion of the Kentucky Court of Appeals. Appendix A.

There was no competent evidence at trial that justifies, either under statute or the precedent of this Court, setting aside the will of the voters and requiring a new election. The Court of Appeals opinion, designated as “to be published” overturns more than 100 years of this Court’s decisions. Furthermore, that Opinion will subject the winners of every county and state election hereafter to the potential of months litigation by any well-

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“[W]e agree with the Board that the number and proportion of absentee votes do not justify invading the sanctity of the ballot box without other evidence of irregularities affecting those votes.” *Id.* at 11.

“Nevertheless, the absence of this information [social security and telephone number] alone does not warrant invalidating those applications.” *Id.* at 12.

“Given this evidence, we disagree that the trial court’s finding that the [Election] Board and the County Clerk amounted to a substantial violation of KRS 117.085(1)(h).” *Id.* at 15.

“Those violations were not so widespread as to invalidate the entire process, but they do reflect on the overall compliance with the statutory procedures for absentee voting.” *Id.* at 15-16.

“However, we agree with the trial court that Montgomery failed to show that this misconduct alone affected the outcome or the integrity of the election.” P. 19.

heeled sore loser that can't accept the decision of a majority of the electorate. A cottage industry of election litigation will follow by those with the funds (and/or lawyers) to continue their campaigns beyond the results of the actual votes by actual voters on election day.

### **BACKGROUND**

Magoffin County was formed in 1860 from parts of Floyd, Johnson and Morgan Counties in Eastern Kentucky. It was named for Beriah Magoffin of Harrodsburg, who served as Kentucky's Governor from 1859 to 1862. Many Kentuckians are familiar with Magoffin County as the place where the Bert T. Combs Mountain Parkway *currently* ends, just west of Salyersville.

Not unlike many other Kentucky counties, politics and elections in Magoffin County are important to its citizens. Magoffin County's Board of Elections utilizes fourteen (14) separate voting precincts on Election Day, in addition to absentee voting in the county court clerk's office. *See, e.g.*, KRS 117.085. And though voter turnout and participation are often well above average, not unlike other rural Eastern Kentucky counties, finding people willing to serve as election poll workers is difficult. Many times selection of an election officer comes down to finding someone "with a pulse." (VR No.1: 2/2/15; 10:42:42).

By statute, precinct election officers are paid a minimum of sixty dollars (\$60.00) for their work on election day. KRS 117.045(11). In Magoffin County, because of the overwhelming Democratic Party voter registration, election officials that are registered as members of the Republican Party are often in especially short supply. Although poll



workers are paid an additional \$10 to go through an election “school”<sup>3</sup>, the complexity of Kentucky’s election laws are often lost on those cajoled into serving as precinct officers. *See* KRS 117.187(4)(VR No.1: 2/2/15; 10:42:42).

Nevertheless, after Appellee Montgomery's “notice filing” Petition, and through his weeks of discovery and multi-day trial, no alleged wrongdoing by or on behalf of Appellant Hardin was presented. Appellee’s non-specific theories of the case in his Petition morphed throughout the months of litigation, and the trial court’s “findings”, or the Court of Appeals Opinion affirming, reveal no evidence of wrongdoing by or on behalf of Dr. Hardin that justifies setting aside an election under Kentucky law.<sup>4</sup> From the notice petition to, at best, innuendo at trial, Appellant is left with briefing the thinnest evidence ever presented to a Kentucky court that set aside an election – and left trying to punch at undefined, unrevealed ghosts.<sup>5</sup>

### **ALLEGATIONS OF VOTE BUYING**

In his Petition, Appellee Montgomery’s petition proclaimed there had been “widespread vote buying” in violation of the Kentucky’s Corrupt Practices Act. But despite clear Kentucky law requiring otherwise, Appellee Montgomery’s Petition made

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<sup>3</sup> In Magoffin, as in most rural counties, the election “school” is presented by the vendor of the voting machines used by the county’s election board.

<sup>4</sup> *See, e.g.*, Judgment at p. 51, para 7 “The Court concludes that the Corrupt Practices Act, KRS 120.015, was violated in the buying of votes *by persons unknown*.” (emphasis added)(Appx. B); *see also* Judgment at p. 47, para 56 “The Court finds that gravel was placed illegally upon private property on at least *four or five* occasions in a short time prior to the election.” (emphasis added).

<sup>5</sup> “Contrary to the stated law, this election has been voided based upon speculation and suspicions.” *See Hardin v. Montgomery, et al.*, 2015-CA-000305-MR, at 38 (Ky. Ct. App. 2015)(Thompson, J., dissenting)(Appx. A). “The evidence presented is not as important as the evidence not presented.” *Id.* at 27.

no specific allegations - no name or other identifier of any person or alleged “widespread” wrongdoer. While that should have resulted in dismissal of the Petition, Appellee was allowed to continue forward with unprecedented discovery. Still, even at trial, Appellee Montgomery presented no proof whatsoever of any vote buying. The sum total of all Appellee’s proof as to this serious accusation was the testimony of three witnesses with severe cognitive disabilities - Jerry Adams, Simon Marshall, and Mickey Marshall.<sup>6</sup>

- *Jerry Adams*

Jerry Adams, (VR No. 2: 2/3/15; 11:26:08) testified that he is unable to read or write, is easily confused, and draws Supplemental Security Income (“SSI”) benefits because of his mental disability. Due to this limited mental capacity, Mr. Adams had difficulty understanding and responding to many questions – and the contradictions within his testimony make even a summary difficult.

Mr. Adams’ second cousin, Jason Holland, apparently took Mr. Adams to the Magoffin County Clerk’s Office to vote. Mr. Adams was shown to the voting booth and asked for help in voting. He indicated that he always requires assistance due to his inability to read. An unidentified man showed Mr. Adams how to use the voting machine, and then left Mr. Adams alone to enter his votes. In another part of Mr.

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<sup>6</sup> Though obvious from a review of the record, the judgment of the trial court recognized the limitations of these individuals. Appellant’s description is not intended to deride these gentlemen, but simply to point out that there is no competent credible evidence in this case. So that this Court can conveniently review the same, and in addition to appearing in the trial court’s overall record, a short DVD with the full excerpts of the trial testimony of these individuals is attached at Appendix C to each of Appellant Hardin’s briefs.

Adams' testimony, Mr. Adams said that he had to have the unidentified man come back in and show him how to change his vote so he could cast a vote for a Republican.<sup>7</sup> What is indisputably clear from Mr. Adams' testimony is that he voted the way he wanted to vote, in private, without outside influence. After Mr. Adams voted, he and his cousin went to a grocery store parking lot where, in a separate vehicle, a person Mr. Adams could not identify may have given his cousin twenty-five dollars (\$25).

Mr. Adams said that he did not know if the twenty-five dollars was for his share of money from selling scrap metal with his cousin. He further testified his the money didn't have any influence on how he voted, that he didn't tell his cousin how he voted, that his cousin didn't tell him who to vote for, and that he always votes for the incumbent Dr. Hardin. For unknown reasons, former counsel for Appellee Montgomery chose not to call Jason Holland, the cousin and Mr. Adams' driver on election day, to testify about Mr. Adams vote or the \$25 in scrap metal he had previously sold.<sup>8</sup>

- *Simon Marshall*

Simon Marshall (VR No. 2: 2/3/15; 2:46:49), also testified that he was unable to read or write.<sup>9</sup> At first, Simon did not know who took him to a precincts' polling place

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<sup>7</sup> Kentucky election ballots utilize the picture of a rooster for candidates of the Democratic Party and a picture of a log cabin for those of the Republican Party. *See, e.g.*, Kentucky Secretary of State Sample Ballot for Franklin County Kentucky - <http://app.sos.ky.gov/ballots/Franklin%202016P.pdf>.

<sup>8</sup> Mr. Adams was described as “[T]he only voter who tangentially testified he received money for his vote later contradicted his own testimony and testified he received money for reasons unrelated to voting.” *Hardin v. Montgomery, et al.*, 2015-CA-000305-MR, at 28 (Ky. Ct. App. 2015)(Thompson, J., dissenting).

<sup>9</sup> It is difficult to watch the testimony of Simon and Mickey Marshall, and to a lesser extent Jerry Adams. These gentlemen clearly do not have even a basic ability to



on election day, but later stated that a man named either Jim Carter or Caudill did. Simon testified that he didn't ask for assistance, but simply voted; but later he said he was assisted by Donna Isaac, an election poll worker. Even with significant help on the stand and prompting from Appellee Montgomery's counsel, Simon had great difficulty understanding even very basic questions and could not locate his signature on documents without further assistance from both counsel and the bailiff. When he finally appeared to understand what was being asked, Simon denied that he had signed them.

Simon denied that either he or his brother sold their vote and said that he returned to his house for the rest of day after voting.<sup>10</sup> In any event, Simon did not testify whether he voted for Dr. Hardin, Mr. Montgomery, or whether he even voted in that particular race on the general election ballot.

- *Mickey Marshall*

Mickey Marshall (VR No. 2: 2/3/15; 3:07:59), Simon's brother, testified that he could not read or write and that his sister was guardian for Mickey and his brother. Mickey said he was taken to the polls by W.J. Salyer along with his brother Simon (at odds with Simon's testimony that he had been taken by Jim Carter or Caudill). Unlike his brother, Mickey acknowledged his signatures on the voter roster and voter assistance

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understand the most elementary concepts. Yet, after months of discovery, their testimony is the entire universe of alleged vote buying. *See* DVD Appx. C.

<sup>10</sup> Appellee Montgomery attempted to impeach Simon with the testimony of Doug Perkins, the operator of a local convenience store. (VR No. 2: 2/3/15; 3:22:09). All Mr. Perkins could say, however, was that his regular customer Simon came into the store with a \$50.00 bill whereas normally he has no more than \$20.00 he earned doing odd jobs. When Mr. Perkins asked him where he got it, Simon said "It's election day." However, Mr. Perkins was very quick to point out in his testimony that Simon Marshall never said he sold his vote.

forms. But like his brother Simon, Mickey denied getting paid to vote and said that he always votes for incumbent Dr. Hardin. After voting Mickey said that he remained at home the rest of the day.

Appellee Montgomery then called Greg Isaac to testify. Mr. Isaac readily admitted he was a supporter of Dr. Hardin and that he took both Mickey and Simon Marshall, along with James Campbell and Paul Blanton to the polls at the Flat Fork precinct since they had no transportation otherwise. There was no evidence that Mr. Isaac paid any of these individuals to vote. Mr. Montgomery did not call James Campbell or Paul Blanton to testify.<sup>11</sup>

### **CLAIMS OF GRAVEL BEING EXCHANGED FOR VOTES**

At trial, and again without any specifics of any particular allegation in his election contest petition or revealing the same in his months of discovery, Appellee Montgomery claimed that a number of people received free county gravel and road work on their private property in exchange for their vote. These claims have been categorized for the Court's convenience:

- *The Shepherd property*

At trial, and though he had not pled the same, Appellee Montgomery claimed that

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<sup>11</sup> The rest of Appellee Montgomery's witnesses provided nothing more than inadmissible hearsay. Vonda Bailey and Maxie Arnett testified that on the evening of the election they went to the Magoffin County Courthouse to hear the election returns, a very popular thing to do in Magoffin County. They were approached by two individuals - Doug Marshall and Bryan Marshall, but neither Doug Marshall nor Bryan Marshall were called to testify by Mr. Montgomery. There certainly was no testimony concerning who those individuals voted for or any direct connection to either candidate for county judge/executive or any other county office on the ballot.

Renee Shepherd, Magoffin County Court Clerk,<sup>12</sup> and Larry Shepherd, her husband, received free gravel for their driveway and repair of a drainage tile (though he made no allegation concerning or connecting such an issue to any election conduct).

The true facts (and the only testimony on the subject) completely dispel nefarious theories.<sup>13</sup> A number of years before Mr. and Mrs. Shepherd purchased their home, a drainage tile was installed by the county highway department between a county road and what later became the Shepherd property. This work was completed during the term of previous Magoffin County Judge/Executive, Paul Hudson Salyer. That drainage tile later collapsed and resulted in drainage issues, causing Larry Shepherd to complain on a number of occasions to the County. The drainage tile was ultimately replaced. (VR No. 2: 2/3/15; 4:00:00 pm).

The road that leads to the Shepherd residence from a county road forks midway on its path, with one fork going to an active cemetery and the other to the Shepherd

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<sup>12</sup> Both Appellant Dr. Hardin and the Magoffin County Clerk were the nominees of the Magoffin Democratic Party for their respective offices.

<sup>13</sup> See testimony of Larry Shepherd. (VR No. 2: 2/3/15; 3:40:55; VR No. 3: 2/4/15; 8:56:11); testimony of Mike Wilson, Deputy Judge/Executive (VR No. 4: 2/9/15; 10:30:00).

Copies of Magoffin Fiscal Court minutes showing the adoption of dozens of roads into the county road system were introduced in the testimony of Deputy Judge Executive Wilson. Most of these adoptions included the exact precise and exact distances set forth in the Fiscal Court minutes, and all were adopted into the county system prior to work being done. (VR No. 4: 2/9/15; 10:30:00) (Magoffin Fiscal Court minutes, Defense Exhibit 14).

Mike Wilson testified about the training he had received in the repair and management of roads from the University of Kentucky Engineering Department in conjunction with State Highway Department. Mr. Wilson was awarded a certificate as a "Roads Scholar" which required completion of nine (9) separate courses, and a certificate as "Road Master" requiring completion of eleven (11) courses, all in road management.



residence. The cemetery road fork was graveled by the County in accordance with long standing Magoffin Fiscal Court policy – consistent with opinions of the Attorney General permitting grading and graveling of roads to cemeteries. *See* Ky. OAG 82-101; (VR No. 3: 2/4/15; 8:50:13). The road to the Shepherd residence, however, was graveled at the Shepherds’ expense and not paid for or completed by the County. (VR No. 3: 2/4/15; 8:50:13). Additionally, that portion of the road leading to the active cemetery was within the county road system by action of the Magoffin Fiscal Court, adopted prior to any work being done.

Finally for the Shepherds, a claim was made that work was performed on a “pipe bridge” at the Shepherd property used for access to the property during periods of flooding. Mr. Montgomery produced one disgruntled former county employee<sup>14</sup> who testified that some old planks were taken up from that pipe bridge in *anticipation of* a repair. On cross examination, however, the former employee admitted that the old planks were returned and in fact no county work was done – the pipe bridge remained status quo. Similarly, the Shepherds denied that any work was done on the bridge by the County (VR No. 2: 2/3/15; 14: 12:51). And importantly, no witness testified that this potential but undone work, was intended to influence a vote in an election.

- *The Howes property/Dodson Branch Road*

Another accusation concerned county work completed on another county road - Dodson Branch Road. Michael Helton, an avowed supporter of Appellee Montgomery (and convicted felon), testified he saw a county worker making improvements on the

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<sup>14</sup> Former because of excessive absenteeism from work and his habit of playing a guitar on the job.

property of Mr. and Mrs. Kermit Howes.

In reality, no unlawful work was done at the Howes' property. There was no testimony that any county work on these county roads was being done to influence a vote, and certainly no work on private property for that or any other reason. The absurdity of Helton's testimony, and the testimony refuting it by Mike Wilson, the Deputy County Judge/Executive, and Kermit Howes, the man who supposedly received the free work and gravel, are included in the short DVD at Appendix C.<sup>15</sup>

Deputy Judge/Executive Wilson testified about the number of complaints concerning drainage issues on Dodson Branch Road. Water often overflowed the road's ditches creating hazardous road conditions, and was a particular problem at Mr. and Mrs. Howes' property, and that of a neighbor. (VR No. 4: 2/9/15; 10:29:50). In order to correct this hazard, a new tile (or culvert)<sup>16</sup> was installed under Dodson Branch Road (Defense Exhibits 16 and 17), across the Kermit Howes property (Defense Exhibit 18), and to the creek adjoining the property (VR No. 4: 2/9/15; 10:31:00)(Defense Exhibits 16, 17 and 18). If the water from the roadway was not drained to the nearby creek it would not remedy the flooding problems over the road.

Kermit Howes testified that he had a new septic system installed by a private contractor at the same time the County was completing repairs on and around Dodson Branch Road. Mr. Howes produced cancelled checks to the private contractors which

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<sup>15</sup> Of note, though Mr. Howes was under subpoena by Mr. Montgomery, he chose not to call him to the stand. The foolishness of Helton's allegations were refuted in less than 5 minutes when Mr. Howes, a clearly apolitical fellow, was called to the stand.

<sup>16</sup> A culvert is "drain or pipe that allows water to flow under a road or railroad." Meriam-Webster Dictionary.

were entered as Defense Exhibit 19. Obviously, some of what Helton may have thought was private work being done by the County was actually private work being done by a private contractor, and paid for by Mr. and Mrs. Howes.<sup>17</sup>

As part of the 1.5 miles of county work along rural Dodson Branch Road, a total of six (6) culverts adjoining the county roadway had to be torn out and replaced. Shifting from Mr. Howes to others, Appellee Montgomery's only witness – Helton, the felon - claimed the driveway of Marty Perkins and Greg Hall were graveled by the county (but without *any* testimony about influencing a vote). Again, Deputy Judge Executive Mike Wilson explained that a twelve inch county placed tile had collapsed on one end of the Perkins's property at the driveway and significant water was being diverted over the county road. This tile had to be replaced to alleviate an unsafe condition. After the tile was replaced and new gravel placed on top to stabilize it, the pile of remaining gravel was spread at that same location incident to the culvert repair. *See* Defense Exhibit 12. As to Mr. Hall's property, Mr. Wilson explained had a similar tile collapse caused water to cover the county roadway necessitating the same kind of repair. (VR No. 4: 2/9/15; 10:36:00).

Not a single person who actually owned any property where the county allegedly completed inappropriate work (attendant to the county road repair and repaving) was called to testify by Appellee Montgomery.<sup>18</sup> Not one – not even Mr. Howes. Instead,

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<sup>17</sup> During this seven days of work on Dodson Branch Road (involving six (6) culverts), the county parked its heavy equipment on Mr. Howes' property. To keep the equipment from sinking, they placed some gravel there to park on, and to allow trucks and equipment to turn around as the work was completed and the road blacktopped. (VR No. 4: 2/9/15; 10:33:12).

<sup>18</sup> At least one of these landowners were under Appellee Montgomery's subpoena and in the courthouse during trial. *See* Kermit Howes testimony, DVD at Appendix C.



Appellee Montgomery relied exclusively on the convicted felon to throw out innuendo as to what work had been done. And still, no evidence connected this regular county road work to the election nor to advocacy for any candidate.

### **CLAIMS OF DISCREPANCIES IN SIGNATURES**

Based on comparing only one (1) previous signature, often decades old, Appellee Montgomery's handwriting expert, Thomas Vastrick, testified that forty-three (43) signatures on the voter roster in the Flat Fork voting precinct did not match voter registration cards, fourteen (14) signatures on voting precinct forms did not match, and twenty-six (26) signatures on the inner and out absentee ballots did not match the signed application. Except for Donna Caudill and Stacy Russell,<sup>19</sup> **not one** of these voters were called to testify as to whether their signatures were forged or to testify for who they voted.

Vastrick's testimony appears to have been given no or little weight by the trial court. *See* Judgment, Paragraph 52, Page 46. For example, called as witness by Appellee, Montgomery supporters' Ms. Donna Caudill and Mr. Stacy Russell testified that they voted in the election. Yet, Vastrick put them on his "expert" list of signatures that allegedly did not match.<sup>20</sup> Not a single witness testified that they saw anyone forge any signature on any rosters. With the exception of Simon Marshall,<sup>21</sup> not a single

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<sup>19</sup> *See infra*, fn 20.

<sup>20</sup> Donna Caudill and Stacy Russell illustrate some of the many variables in signature analysis. Donna Caudill was 18 when she signed her voter registration card and was 48 years old at trial, and when she signed the precinct roster. Mr. Stacy Russell testified he signed the voter registration when he was eighteen and that he is left handed. On election day, however, Mr. Russell testified that he had to sign the precinct roster with his right hand because his left arm was in a sling (as it remained so when he testified at trial).

<sup>21</sup> *See supra*, 7-8.

witness testified that their signature on any precinct roster, absentee ballot application, or an absentee ballot was a forgery.

Finally, the testimony of Stephen Slyter, the forensic documents examiner for the Magoffin County Board of Elections, explained that it was wholly inappropriate for Vastrick to draw conclusions based on a comparison to a single signature, and especially one that was decades old. Mr. Slyter testified that after his analysis of Vastrick's work, he would flag only ten (10) signatures for further review – and then would request additional, and current, writing specimens. Mr. Slyter explained that signatures can vary because of age, posture, rest distractions, and medications.<sup>22</sup>

### **ABSENTEE BALLOTS**

- ***The Number of Absentee Ballots***

As in every Kentucky county, people vote by absentee ballot in Magoffin County in their County Court Clerk's office prior to election day, or by returning their ballots by mail. And although Appellee attempted to make much of the numbers, Magoffin County has historically had a large proportion of absentee voters. It has more than 1,500 union workers who work at various locations outside of the county, and it is also home to a significant elderly population.<sup>23</sup> In the 2006 general election, for example, there were 1,031 absentee voters; in the 2010 general election there were 1,088 absentee voters; and in the 2014 general election there were 1,179 absentee voters.

Even the slight increase in the 2014 general election becomes obvious when it is

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<sup>22</sup> Or in the case of Mr. Stacy Russell, when an individual who is left handed has to sign their name with their right hand because their left arm is injured and in a sling.

<sup>23</sup> Appellant Dr. Hardin has been a family physician for decades in Salyersville and has many patients that, because of age and infirmity, must vote by utilizing the statutory absentee process.

revealed that several local school board seats were on the ballot (and the school board had just raised taxes), there were numerous other contested county races, congressional races, a nationally watched race for U.S. Senate, and local city races including a particularly fierce race for the office of Mayor of Salyersville.

- ***Absentee Ballot Applications***

The claims of irregularities with regard to absentee ballot applications were not brought forward until January 22, 2015, fifty (50) days after Appellee Montgomery filed his election contest petition and only ten (10) days before trial was to commence on February 2, 2015. For the convenience of this Court, one of the absentee ballot applications from those admitted at trial is at Appendix D (Box 9 unfilled).

In pursuit of a factual basis to support his election contest, Appellee Montgomery sought to impose nonexistent legal requirements in the completion of absentee voter applications that are not statutorily required under KRS 117.085(2) – such as the entry of social security numbers and phone numbers that were not filled in on some of the absentee applications. The Magoffin County Clerk testified that during state provided training just before the 2014 election she was informed that social security numbers were no longer required due to privacy concerns. (VR No.1: 2/2/15;11:02:40; 11:03:00).

Appellee Montgomery strained at other insignificant omissions in the absentee applications. For example, 354 absentee voters completed their Kentucky State Board of Elections absentee application form listing their correct home address, and checked Box #10 (unable to vote because of illness or disability). *See* Appx. D. Though the logical conclusion is that these individuals would be at home at their residence listed in the application and otherwise unable to vote at a precinct poll (VR No.1: 2/2/15; 11:00:00),



Appellee Montgomery sought to have all these voters disenfranchised because they had not checked Box 9 as well (where the voter would be on election day checked). Such a trivial issue had never been an issue before according to the County Clerk. (VR No.1: 2/2/15; 11:01:07; 1:32:00). No witness for Appellee Montgomery made any attempt to explain how this omission effected the fairness and integrity of the election – nor did Appellee Montgomery call any of these voters to testify.

Similarly, Mr. Montgomery complained that thirty-three (33) absentee voter applications had Box 15 checked (out of town employment) without also having Box 9 completed (where the voter would be on election day). The Magoffin Chief Deputy County Clerk explained that many union workers are out of the county on Election Day but that their specific job location may vary. Again, Mr. Montgomery made no attempt to connect this omission to any alleged unfairness or effect on the integrity of the election. Importantly, Appellee Montgomery again called none of these voters to testify – and made no point about how any of these issues had any effect on the election.

The Kentucky State Board of Elections has never considered this to be an issue, at least on their computer system. (VR No.1: 2/2/15; 10:56:00). The Magoffin County Clerk, testified that when completing the applications on the State Board of Elections intranet website<sup>24</sup> it is necessary to complete certain fields or boxes before an absentee ballot will be issued. In other words, as long as one of the boxes is completed along with other required information, the Board of Elections computer will issue an absentee ballot even if Box 9 is left incomplete.

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<sup>24</sup> This is the closed access computer system that directly links the State Board of Elections in Frankfort to County Clerk's Offices across Kentucky.

- ***The Counting of the Absentee Ballots***

Like those in many other rural counties, the Magoffin County Clerk's absentee ballot box is made of heavy real-oak, and padlocked with three separate locks requiring three separate keys, held by three separate individuals. (VR No.1: 2/2/15; 1:41:50). No one person can unlock the box, and only the strongest person could possibly lift it.

On election day, the Magoffin Board of Elections counts the absentee ballots on a long wooden table in the open, publicly viewed, Magoffin Fiscal Court meeting room. At the last general election, each member of the Election Board was seated at the table and in plain view of every other election officer. The audience, candidates, and their observers were gathered in the gallery facing the election officers.

Because of the significant weight of the padlocked wooden absentee ballot box, it was physically impossible to lift and shake the ballots up in the box. Just as they had done since at least 1994, the ballot box was unlocked in plain view of all the election officers and the audience and the ballot envelopes then mixed-up or shuffled. The ballot envelopes were then organized by precinct and a comparison was made of the signatures on the registration cards, the outer flap, and the inner flap for each ballot. The flaps on the inner envelopes were torn off, and the unopened ballot envelopes put back into the heavy oak box and thoroughly stirred up to protect the anonymity of the voter. The meeting room was open for anyone wishing to observe, and two candidates and the representative of a candidate did in fact observe. No one complained about the procedure, and Appellee Montgomery neither attended nor sent a representative to observe. No person testified as to any effect on the election, and nothing in the process that the Election Board utilized should disenfranchise the voters of this general election, or

deprive Appellant of his duly elected office.

### **TECHNICAL AND CLERICAL QUESTIONS**

For his most minute complaints, Appellee Montgomery focused on clerical errors in the Flat Fork Precinct. More particularly, it appeared that Jeff Isaac, that precinct's Clerk, frequently failed to initial the box following the bubble showing the means of identification of the voter. (*See* sample page from the record - Flat Fork precinct roster at Appendix E). The testimony from every witness, however, established that Mr. Isaac solely manned the sign-in roster for the entire day without interruption. If a question arose about a specific voter or voters, then Jeff Isaac would have been the only "go to" person for an explanation. But, continuing his pattern of general complaint without any specifics as to how it affected the election, Appellee Montgomery didn't call Jeff Isaac as a witness. Nor did Appellee Montgomery call any other clerks from other precincts to testify that had made similar technical omissions. At no point in the proceedings did Mr. Montgomery provide any explanation as to how this "fill in the bubble" omission affected the fairness and integrity of the election. As a consequence of these alleged vagaries, however, the outcome of one election on a ballot full of contested races has been thrown out and its voters wholly disenfranchised.



## ARGUMENT

Affirming the trial court is an injustice not only to elected Magoffin County Judge Executive Hardin but to the voters of Magoffin County who elected Hardin. The evidence is woefully short of that required to warrant juridical intervention and voiding this election. The electoral process is the core of our government and a court should abhor intervening.

...

Here as indicated by the majority, there was not even a scintilla of evidence Hardin violated the Corrupt Practices Act or the Act was violated with his knowledge, consent or procurement. Moreover, the only voter who tangentially testified he received money for his vote later contradicted his own testimony and testified he received money for reasons unrelated to voting.

Not a single witness testified that any offer was made to provide gravel and work in exchange for a vote for Hardin.

...

Contrary to the stated law, this election has been voided based on speculation and suspicions.

*Hardin v. Montgomery, et al.*, 2015-CA-000305-MR, pp. 24, 30, 38 (Ky. Ct. App. 2015)(Thompson, J., dissenting).

In nullifying the results of the November 2014 general election, without any evidence of fraud or wrongdoing by either candidate, the trial court has forced its will ahead of the voters it disenfranchised and has disregarded the requirements of Kentucky law.<sup>25</sup> As succinctly stated in *Stewart v. Wurts*, 143 Ky. 39 (*quoting Skain v. Milward*, 127 S.W. 773 (Ky. 1910)):

The burden of proof is on the contestants to show such fraud, intimidation, bribery or violence in the conduct of the election that neither the contestant, nor the contestee can be adjudged to have been fairly elected. These things are not presumed. But it must be affirmatively shown, not only that they existed, but that they affected the result to

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<sup>25</sup> The time and attention devoted to the Court of Appeals' dissenting opinion is apparent from even a cursory read, and is deserving of this Court's full detailed review.

such an extent that it cannot be reasonably determined who was elected. Elections are not lightly set aside. They are the means provided by law for the expression of the will of the people. To set them aside unnecessarily would be to destroy that confidence in them which is essential. If often set aside they would be less attended; for the voters would await the next chance, and the election instead of settling things, would be only the starting point for new controversies. Elections must be free and equal, but they cannot be free and equal unless supported by public confidence. When once the notion prevails that confidence cannot be placed in the stability of elections, their power and usefulness is destroyed.

*Stewart*, 143 Ky. at 52; *Skain*, 138 Ky. at 218.<sup>26</sup>

**I. COUNTS XIII AND XV OF THE PETITION WERE FACIALLY AND FATALLY DEFECTIVE**

Counts XIII and XV of the petition are facially, and fatally, defective. This issue was preserved for appellate review by the Dr. Hardin's Motion to Dismiss which was denied by the trial court. Count XIII alleges that election officials provided absentee ballots to people ineligible to vote, counted ballots of deceased persons, and engaged in other irregularities affecting the fairness of the election. The Petition *fails to identify a single individual* or set forth any evidence that invalid votes were cast for Dr. Charles Hardin.

Count XV of the Petition alleges that Dr. Hardin bought votes in consideration of paving work, gravel, cash, and other incentives but again *fails to identify a single voter*. These allegations are insufficient as a matter of law and fail to address the heightened pleading standards of election contests.

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<sup>26</sup> The *Skain* Court held: "To set aside an election, fairly held, on such proof as we have here would be to lay down a rule under which confidence in elections would be impaired, and litigation over them would be invited." *Skain*, 138 Ky. at 218.

This rule is set forth in *Gross vs. West*, 283 S.W.2d 358 (1955):

It is the established rule that where the casting of ineligible votes constitutes a ground of contest, the pleader must name in his pleading those persons whose votes he questions. *Widick v. Ralston*, 303 Ky. 373, 197 S.W.2d 261, 198 S.W.2d 56; *Johnson v. May*, 305 Ky. 292, 203 S.W.2d 37. One attacking the qualifications of a voter has the burden of proof. *Combs v. Brewer*, 169 Ky. 571, 184 S.W.2d 892.

This is not merely an academic argument. As part of the weeks of discovery allowed to Appellee Montgomery by the trial court, Dr. Hardin spent fifteen hours in a discovery deposition trying to find out directly from Appellee Montgomery the identity of those persons whose votes were bought, whose driveways were graveled, and who received what other illegal (and unspecified) benefits. The consistent stock answer was that “everybody knows it” and “it is common knowledge.” Furthermore, despite having been given almost unfettered discovery, Appellee Montgomery was still unable to produce any evidence of wrongdoing at trial.

## **II. THERE IS NO EVIDENCE THAT VOTES WERE BOUGHT BY OR AT THE DIRECTION OF DR. HARDIN**

This argument was preserved for appellate review by motions for directed verdict at the close of the plaintiff's case (VR No. 3: 2/4/15; 1:52:45 pm), renewed motion for directed verdict at the close of all the evidence (VR No. 4: 2/9/15; 2:20:23 pm), and the Respondents' Joint Brief on Authority (TR 552-557).

Of the 6,534 votes cast in the 2014 general election for the office of Magoffin County Judge/Executive, Appellee Montgomery produced at trial a grand total of three (3) severely mentally challenged individuals who *did not testify* they sold their vote - Jerry Adams, Simon Marshal, and Mickey Marshal. Appendix C, DVD. Simon did not



even testify that he voted for Dr. Hardin. However, even if those votes are taken away it doesn't change the outcome.

In Paragraph 58 on Page 48 of the Judgment, the trial found that Doug Marshal, and Brian Marshal cast votes as a result of being paid or expecting to be paid. Neither Doug Marshal nor Bryan Marshal was called to testify, and such a conclusion is based on no competent evidence whatsoever. The Appellee has succeeded in "smuggling" this allegation in through incompetent evidence via the hearsay testimony of Vonda Bailey and Maxine Arnett - which the trial court ruled inadmissible hearsay. Ultimately, there is still a total and complete absence of any evidence linking Dr. Hardin with allegations of vote buying.

In *Dyche v. Scoville*, 270 Ky.196 (1937), Scoville was the Republican candidate for jailer of Laurel County. There was evidence that Scoville came to the house of Charley Parsley and gave him two dollars (\$2) on the morning of the election but did not actually ask him to vote for him. Kissie Rogers testified that Scoville came to her house on Election Day and took her, her daughter, and her husband to the polls. Upon returning he gave each of the one dollar (\$1) but said nothing about voting for him. John Higginbottom testified that Ed Bender, a Scoville supporter, brought him a sack of meal, bucket of lard and two pounds of sugar two days before the election. The candidate's uncle, W. N. Scoville was seen handing out money to voters. In upholding the election of Scoville, this Court noted a couple of things: first, the witnesses did not make it clear that the giving of the money was for the purpose of buying a vote; second, the activities of W. N. Scoville and Ed Bender could not be charged to Chester Scoville:

There is a total lack of testimony by which the actions of W. N. Scoville or Ed Bender can be charged to

appellee; there is an entire absence of proof that he had any knowledge of their alleged activities. This is true as to any stated activity of W. N. Scoville on the date of the execution.

“Corrupt Practice Act does not fasten liability on candidate by application of doctrine of ‘imputed knowledge’, but actual knowledge of illegal acts is essential.”

“Actual knowledge of the candidate of the illegal acts of another in his behalf is an indispensable element to be established. It cannot be inferred from merely suspicious circumstances of a vague character.”

...  
[t]he witnesses do not make it plain that the alleged giving of the money was for the purposes of bribery, or with the intention of bribing. In this respect the testimony is not satisfactory.

*Id.* at 201 (citations omitted).

In *Wheeler v. Marshall*, 132 S.W.2d 519 (1939), Mrs. Marshall was a candidate for a seat on his county’s Board of Education. Many of the witnesses called by the contestant who were openly friends and supporters of Mrs. Marshall boldly admitted that they bought votes for her. In upholding the election, this Court no one ever discussed the use of money with the candidate or that she had any knowledge or information that the money was being spent corruptly. Consequently, there was nothing in the record to support circumstances from which knowledge of the misconduct of the supporters could be inferred to the candidate. *See also Howard v. Parsons*, 47 S.W.2d 545 (1932) (evidence insufficient).

**III. THERE IS NO EVIDENCE THAT GRAVEL WAS EITHER UNLAWFULLY PLACED, OR UNLAWFULLY PLACED BY OR AT THE DIRECTION OF DR. HARDIN**

This argument was preserved for appellate review by motions for directed verdict at the close of the plaintiff’s case (VR No. 3: 2/4/15; 1:52:45 pm), renewed motion for

directed verdict at the close of all the evidence (VR No. 4: 2/9/15; 2:20:23 pm), and the Respondents Joint Brief on Authority (TR 552-557; Appendix Tab 10).

In Paragraph 56 on page 47 of its Judgment, and again in Paragraph 6 of its Conclusions of Law, the trial court found that employees of the Fiscal Court under the direct supervision of Dr. Hardin illegally placed gravel on private property on at least *four or five* occasions. Just like Appellee's originating Petition, the Court did not identify what private property was illegally graveled. The gravel placed on one fork of the Shepherd road was paid for by the Shepherds; the gravel placed on the other fork was part of the county road system (as documented by the fiscal court minutes) and provided access to a cemetery. This was unrebutted. Neither Mr. Montgomery nor the trial court challenged the legality of the Magoffin Fiscal Court's adoption of the portion of the road into the county road system. OAG 82-101 provides that county road work to private cemeteries is perfectly legal. In the absence of a definitive court ruling to the contrary, the Magoffin Fiscal Court has a right to rely on OAG opinions.

Any gravel placed on driveways along Dodson Branch Road was incidental to the renovation and repair along a mile and a half (1.5 mile) section of rural county roadway. It is undisputed that the county didn't work on Kermit Howes' septic system. Finally, there was no evidence linking the county road department to private work or the private delivery of gravel to anyone else – and certainly not on or behalf of Dr. Hardin – and certainly not with the intent to influence the election. Before setting aside the results of a lawfully conducted election by judicial order, the voters of Magoffin County deserved to know what actions attributed directly to Dr. Hardin, with specific persons and specific property, allegedly run afoul of the election contest and "corrupt practices" statutes. The



voters deserve better than a vague broadside of “*four or five*” times.

**IV. THE MAGOFFIN COUNTY BOARD OF ELECTIONS EITHER FULLY COMPLIED OR SUBSTANTIALLY COMPLIED WITH THE PROVISIONS OF KRS CHAPTER 117**

These arguments are preserved for appellate review by motions for directed verdict at the close of the plaintiff's case (VR No. 3: 2/4/15; 1:52:45 pm), renewed motion for directed verdict at the close of all the evidence (VR No. 4: 2/9/15; 2:20:23 pm), and the Respondents Joint Brief on Authority (TR 552-557).

Additionally, this issue was procedurally defaulted by the Appellee. KRS 120.155 makes it clear that all issues of contest must be raised in the initial petition. In this case, the Appellee/Petitioner did not raise the issue of KRS 117.085(2) until January 22, 2015, only a few days before this case was to be tried on February 2, 2015. The Appellants preserved this issue for appellate review by the responses of the Election Board and Dr. Hardin to the Motion for Summary Judgment filed by Mr. Montgomery.

Three guiding principles emerge from the case law. First, substantial compliance rather than literal compliance is the benchmark. Counsel cannot improve upon the Election Board's response dated January 29, 2015, to the plaintiff's Summary Judgment motion:

Disenfranchising voters and overturning elections is an extreme measure and should only be taken when there have been "fragrant violations of the statute" of such a magnitude so as to effectively "destroy any hope that results as tabulated would be [a] fair indication of sense of voters". *Upton v. Knuckles*, 470 S.W.2d 822, 825 (Ky. App. 1971). Further, Kentucky's appellate courts have recognized that carrying out the absentee-ballot process is difficult. *Hale v. Goble*, 356 S.W.2d 33, 35 (Ky. 1961) ("To say the least, the absentee voting law is difficult to administer."). That is why appellate courts have repeated time and again that substantial compliance -- rather than

literal compliance -- with the process is required and suffices to uphold an election. *E.g.*, *Stable v. Osborne*, 217 S.W.2d 980, 982 (Ky. 1949) ("substantial compliance is sufficient if the proper ends are reached"); *Jarboe v. Smith*, 350 S.W.2d 490, 493 (Ky. 1961) ("Through all the cases relating to absentee voting, the theme of substantial compliance with statutory regulations is omnipresent") (emphasis in original). Technical violations are insufficient to disenfranchise voters. *Id.* The crucial question, then, is whether the technical violation strikes at the heart of the election and shows that the election was fraudulent. *Sims v. Atwell*, 556 S.W.2d 929, 937 (Ky. App. 1977) (holding that entire precinct should not be thrown out when violations of election law were not so "fragrant, extensive and corrupt that all" of the votes in the precinct should be deemed void and illegal); *see also Steel v. Meek*, 226 S.W.2d 542 (Ky. 1950) (allowed votes even where county clerk did not follow absentee-voting procedure because there was no showing of "bad faith, misconduct or fraud"). And, even when more than a technical violation is present, the evidence must show a "molestation or alteration of the ballots." *Ward v. Salyer*, 140 S.W.2d 1016, 1020 (Ky. 1940) (upholding election even when absentee ballot box was left unattended and unlocked because there was no evidence that ballots had been "molest[ed] or alter[ed]")' *see also Jarboe*, 350 S.W.2d at 493 (1961) (holding that laying absentee ballots in open box or upon table without re-depositing them in regular box as required by statute not sufficient violation to invalidate absentee ballots).

Pages 11-12 of the Election Board's response dated January 29, 2015, to the Summary Judgment motion (footnote omitted).

Second, a court must determine if the provisions of a statute are directory or mandatory. An excellent discussion of that issue was provided in *Ferguson v. Gregory*, 216 Ky. 382, 397 (1926). In quoting an earlier opinion with approval the Court held:

The language of the statute to be construed must be consulted and followed. If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the result of the election or not. Such a



statute is imperative, and all considerations touching its policy or impolicy must be addressed to the Legislature. But if, as in most cases, the statute imply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.

*Ferguson*, 216 Ky. at 397(quoted *Anderson v. Winfree*, 85 Ky. 597, 609-610 (1887)).

Third, under the mandate of *Watts v. Fugate*, 442 S.W.2d 569 (Ky. 1969), the contestant bears the burden of proving for whom the illegal vote was cast. In this matter, the contestant failed to meet that burden.

A. **THE BOARD OF ELECTIONS COMPLIED WITH THE APPLICATION REQUIREMENTS OF KRS 117.085(2)**

KRS 117.085(2) provides in part:

The absentee ballot application form shall be in the form prescribed by the State Board of Elections, shall bear the seal of the county clerk, and shall contain the following information: name, residential address, precinct, party affiliation, statement of the reason the person cannot vote in person on election day, statement of where the voter shall be on election day, statement of compliance with residency requirements for voting in the precinct, and the voter's mailing address for an absentee ballot. The form shall be verified and signed by the voter.

In Paragraph 2 on Page 49 of the Judgment, the trial court recognized that a social security number was not a requirement under the statute, but found that the Election Board had violated the “policy” of the Kentucky Board of Elections. It is too fundamental to require citation to authority that a statute trumps administrative policy, and such a “conclusion of law” should not be used to overturn an election – especially when there is no evidence whatsoever that the outcome was unaffected.

As noted in this Brief’s Statement of the case, *supra*, three hundred fifty-four



(354) absentee voters correctly filled out their residential addresses on the application form for an absentee ballot provided by the Kentucky State Board of Elections. Those voters then correctly checked the box that they would be home on Election Day due to illness or incapacity. Their failure, if any, was by not saying in Box 9 stating where they would be on election day. These voters deserved better than to have their votes cast aside when there was not one scintilla of evidence of their own or anyone else's wrongdoing – and when not one of those voters was called to testify.

Similarly, thirty-three (33) voter applications had the employment Box 15 (out-of-town employment) checked without Box 9 (where the voter would be on Election Day) completed. This is substantial compliance as set forth in the case law above. But assuming for purposes of discussion that it fails to meet such a minimal threshold, this uncompleted box on a government form, without evidence of wrongdoing or testimony of any of the thirty-three (33) voters, must be merely directory and not mandatory. Under the mandate of *Ferguson, supra*, the filling in of this box would be considered directory since the statute does not provide that filling out that particular box makes the vote illegal.

According to Mr. Montgomery's proof, there were three applications that were not verified – yet he did not call any of those voters to testify how they voted. Under the requirements of *Watts v. Fugate, supra*,<sup>27</sup> those votes should be charged against Mr. Montgomery. However, even if those votes are reduced from Dr. Hardin's total, it would not change the outcome of the election.

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<sup>27</sup> “If the contestant does not know how the illegal votes were cast, and there were not enough to invalidate the election, he does not have a cause of action but only an inquiry, or a fishing expedition for which the statute does not provide.” *Watts*, 442 S.W.2d at 574.

**B. THE MAGOFFIN COUNTY BOARD OF ELECTIONS  
COMPLIED WITH KRS 117.085(1)(h)**

KRS 117.085(1)(h) provides, in part:

If the members of the county board of elections or their designees do not serve as precinct election officers for the absentee voting, the county clerk or deputy county clerks shall supervise the absentee voting.

In house voting was scheduled to start on Monday, October 20, 2014. The Election Board was in full compliance with the statute above. But on Friday October 17, 2014, a Republican member of the Board, resigned. The Chair of the Republican Executive Committee was notified immediately and Justin Williams, a local minister and crusader for clean elections, was appointed on October 23, 2014, and served through November 3, 2014. By statute, the in house voting took place from October 20, 2014, to November 3, 2014.

The trial court erroneously held that the statute had been violated because absentee voting was conducted without a Republican board member. In fact, however, the Election Board followed KRS 117.085(1)(h) which specifically states that the county clerk or deputy county clerks shall supervise the absentee voting if members of the county board are not available to serve. Moreover, Garlena Workman, a Republican and supporter of John Montgomery, remained as the Republican challenger on the board per KRS 117.315 and 117.316. Ms. Workman testified at the trial that she saw no irregularities in the voting.

If the county court clerk had shut down the voting for those few days until Justin Williams began to serve, then she would have been in violation of KRS 117.085(1)(c) the statute requiring at least twelve (12) days of absentee voting.

**C. THE MAGOFFIN COUNTY BOARD OF ELECTIONS  
SUBSTANTIALLY COMPLIED WITH KRS 118.0873(3)**

KRS 118.0873(3) sets forth the procedure for counting absentee ballots. The Court concluded that the Election Board violated the statute by failing to count the ballots one at a time and distributing the ballots among the officials present.

The method employed by the Election Board is set out in the Statement of Facts above. The trial court's Judgment fails to explain how the procedure used for decades affected the fairness and integrity of the election. The method actually employed was certainly in substantial compliance with the statute. Going back to the test set forth in *Ferguson, supra*, the statutory procedure would be considered directory rather than mandatory because the method employed does not affect the actual merits of the election.

**D. FAILURE TO COMPLY WITH KRS 117.227**

KRS 117.227 provides in part "[t]he election officer confirming the identity shall sign the precinct voter roster and list the method of identification." Once again the trial court did not address how this affected the fairness and integrity of the election. In any event, this failure would be considered directory rather than mandatory.

The decision of *Ferguson vs. Gregory*, 216 Ky. 382 (1926), *supra*, is applicable. The statute then in effect required that election officers mark in the column of the registration book opposite the name of the person voting the word "voted". At the time the polls closed they were to mark opposite the name each person who had not voted "not voted." The elections officers at one precinct failed to make those notations and the contestant sought to have all the votes of the precinct thrown out. This Court held that such a requirement was directory rather than mandatory and refused to disenfranchise the voters for the failure of an election clerk.



**E. CLAIMED VIOLATIONS OF KRS 117.255(3)**

Simon and Mickey Marshall testified that Flat Fork precinct official Donna Isaac assisted them in voting without the help of the Republican precinct judge.<sup>28</sup> Stephanie Montgomery (VR No.1: 2/2/15; 03:38:37) testified she saw Donna Isaac assist voters without the Republican judge, but could not say how many voters there were, who they were, or who they voted for. Under the mandate of *Watts v. Fugate, supra*, those unidentified voters would be charged against John Montgomery and not Dr. Hardin. Aside from the limitations of the Marshalls discussed above, and that no poll workers indicated any particular instances or any particular voters, even disregarding those two votes does not change the outcome of the election.

**CONCLUSION**

As human beings, we often presume things to be so in day to day life without considering any evidence. We even presume that particular outcomes must simply be based so even if those things aren't proven. But the law is different - and it requires more than innuendo and supposition, and it cannot abide establishing as true any desired outcomes from those whose responsibilities otherwise are to weigh the hard evidence as presented and apply the law fairly.<sup>29</sup> For the foregoing reasons the Court should reverse

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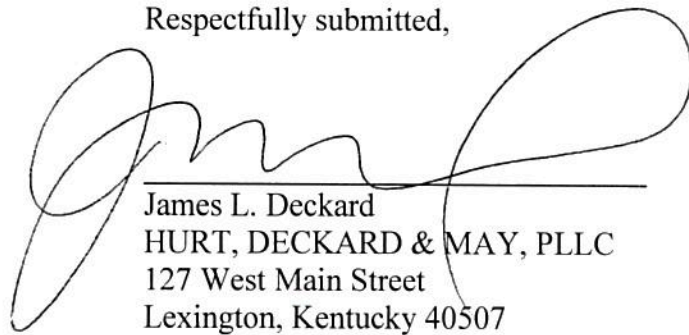
<sup>28</sup> See *supra* at 8.

<sup>29</sup> As the dissent below concluded:

Contrary to the stated law, this election has been voided based upon speculation and suspicions. Perhaps the seeds of these suspicions are planted from what the majority considers a history of election misconduct in Magoffin County. I do not attempt to contradict the majority's historical account. Regardless of the sins of past candidates and elected officials, we are required to decide the fate of

the decision of the Kentucky Court of Appeals, and remand this matter to the Magoffin Circuit Court with directions to dismiss the Petition.

Respectfully submitted,

A large, stylized handwritten signature in black ink, likely belonging to James L. Deckard, is positioned above the printed contact information.

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this election based on the facts presented, or more importantly, those not presented. Not a single witness who could have been called from the absentee voting list was called to testify that he or she did not vote, was intimidated, or that there was a fraud in the process. There was no evidence that any Board of Elections member or election official acted in bad faith. The evidence was that all duties were undertaken in good faith and in substantial compliance with the applicable laws and regulations.

*Hardin v. Montgomery, et al.*, No. 2015-CA-000305-MR, at 38-39 (Ky. Ct. App. 2014) (Thompson, J., dissenting).